

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6146

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

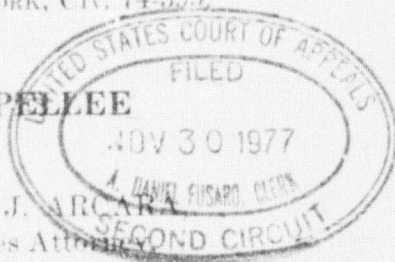
THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
VS.
190 PIECES OF GOLD JEWELRY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK, CIV. 74-399.

BRIEF FOR THE APPELLEE

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IN THE
United States Court of Appeals

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Docket No. 77-6146

UNITED STATES OF AMERICA,

Appellee,

vs.

190 PIECES OF GOLD JEWELRY,

Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

On August 20, 1974, a Libel was filed by the United States seeking forfeiture of various items of gold jewelry and a penalty equal to the value thereof pursuant to Title 19, United States Code, Sections 1497, 1581 and 1610. An Answer was served and issue was joined on November 29, 1974, and a Note of Issue was filed by the United States on August 12, 1975, noticing the matter ready for trial. Then, pursuant to stipulation of counsel and the Order of the Hon. John T. Curtin, United States District Judge in and for the Western District of New York, the above matter was referred to the United States Magistrate in and for the Western District of New York, Hon. Edmund F. Maxwell, for trial and decision.

Trial was held on December 20, 1976 and February 22, 1977. Following that, legal memoranda was submitted by the

appellee on March 18, 1977 and by the appellant on May 20, 1977.

On June 30, 1977, he rendered his decision, finding that the jewelry seized from the person and vehicle of Herman Klein on January 6, 1972 are forfeited to the United States and that Herman Klein is libel to a penalty to the United States in the sum of \$21,038.00 (App. 15-16). Judgment issued on the same day. From that Judgment, a Notice of Appeal was timely filed.

Question Presented

Was the gold jewelry subject to forfeiture and the claimant, Herman Klein, libel to a penalty equal to the value thereof?

Statement of the Case

Since the appellant concedes that the facts as found by the Magistrate are true, complete and accurate, those facts are adopted by the appellee and herewith follow (App. 8-11):

On January 6, 1972, at approximately 10:30 P.M., the claimant, Herman Klein, approached the Peace Bridge at Buffalo, New York, from the Dominion of Canada, driving a 1968 Oldsmobile bearing Ontario Registration No. 125229. When questioned as to his citizenship, Klein claimed to be a Canadian citizen with United States resident status. When asked if he was importing anything, he replied that he had purchased some fish in Canada. When asked if he was importing anything else, Klein stated that he was not.

Klein was then sent to secondary inspection for further questioning, in view of the fact that he was driving a vehicle registered in Canada. Klein presented a United States Alien

Registration Card, an Ontario drivers license, and an Ontario vehicle registration for his Oldsmobile. He advised the Customs inspector that he was going to New York where he lived. When asked what he was doing in Canada, Klein responded that he was in the cattle business and had been on a cattle buying trip to Toronto for approximately four days. He could not recall the names of any motels he claimed to have stayed in, nor could he produce any receipts for payment of motel rooms. He refused to give the names of any persons he visited on his cattle buying trip.

When asked if he was bringing anything back with him from Canada, he responded in the negative. A search of Klein's pockets revealed a watch, a gold ring, and a pair of earrings. When asked why he did not mention this jewelry, Klein responded that he did not think it mattered as the jewelry was from the United States. He was told by the Customs inspector that he should have mentioned the jewelry. The Customs inspector asked if he was sure that he was not in the jewelry business as opposed to the cattle business, but Klein denied being in the jewelry business. Klein was then taken to his vehicle and asked what he had in his car. Klein stated that he had a box of fish, a suitcase, and some clothes, and when queried as to whether he was sure those were the only items in the car, Klein responded by saying, "That is all I have." A subsequent inspection of the vehicle revealed that cases containing 187 pieces of gold jewelry had been concealed behind false cardboard panels in the trunk of the vehicle. One of the pieces, a watch, bore the imprint "Italy" on its clasp.

The claimant, Herman Klein, a native of Czechoslovakia, resided in Canada from 1952 until 1968 when he moved to the United States. While living in Canada, he had been in the retail meat business. He had not been in the jewelry business prior to 1968, but after he became a resident of the United

States, he opened a jewelry business in New York City under the name of Comfort Jewelers and in Toronto, Ontario under the name of Consolidated Gold Craft, Ltd. Within a few days prior to the seizure, a Toronto bank account for the Canadian firm was still open. The Canadian business had been engaged in the importation of jewelry from the United States, and Klein had knowledge of Customs regulations. He paid a penalty to Canadian Customs in 1969 for undervaluing jewelry being imported into Canada.

As admitted by Klein in his trial testimony, he lied to the United States Customs authorities on January 6, 1972 when he claimed to have been in Canada for four days on a cattle buying trip, he lied when he denied being in the jewelry business, and he lied when he denied having anything in his automobile except a box of fish and personal clothing. His claim is that the jewelry found in the trunk was put in the car on January 4, 1972, in New York City, that it was in the car when he went into Canada, and that the same jewelry was in the trunk of his vehicle when he returned to the United States on January 6, 1972. He further claimed that all of the jewelry in the trunk had been manufactured in the United States. Thus, he contends that it is not subject to duty on re-entry, and, therefore, need not have been declared to Customs.

The parties hereto stipulated that if an expert appraiser were to testify during the course of the trial, the seized jewelry would be valued at \$21,038.00. There being no evidence to the contrary, the Magistrate determined that that was the value of the jewelry (App. 15).

ARGUMENT.

The gold jewelry was subject to forfeiture and the claimant, Herman Klein, libel to a penalty equal to the value thereof.

This libel action was commenced under Title 19, United States Code, Section 1497 which provides as follows:

Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be libel to a penalty equal to the value of such article.

The pertinent regulation promulgated thereunder is Title 19, Code of Federal Regulations, Section 10.19(a) [now Title 19, Code of Federal Regulations, Section 148.11]. That section provides as follows:

Declaration and entry— (a) Declaration Required. All articles brought into the United States by any individual shall be declared to a Customs officer . . .

The law is clear that once the Government establishes that goods, wares or merchandise are being entered into the country, the goods are *prima facie*, subject to seizure and the burden shifts to the claimant to demonstrate that such goods, wares, or merchandise are not subject to declaration. See *Ten Cases of Opium*, 23 Federal Cases 840, Case No. 13,828 (D.C. Ore. 1864); *United States vs. Twenty Cases of Matches*, 28 Federal Cases 242, Case No. 16,559 (D.C. Wis. 1868). It is also clear that is not necessary to prove intent to defraud to make out a violation of Title 19, United States Code, Section 1497. See *United States vs. Chesborough*, 178 F. 778 (1910); *United States vs. Cut and Polished Diamonds*, 137 F.Supp. 527

(D.C. Mass. 1955); *Leiser vs. United States*, 234 F.2d 648, *cert. denied* 352 U.S. 893. Even in a prosecution under Title 21, United States Code, Section 952 which makes it a crime to wilfully import a controlled substance into the United States, Courts have held that it is not necessary to prove a specific intent to defraud the Customs laws. *United States vs. Friedman*, 501 F.2d 1352, 1354 (9th Cir. 1974), *cert. denied*, 95 S.Ct. 635.

Even if the jewelry were of domestic origin, it is subject to forfeiture because of Klein's failure to make a declaration. The regulations set out the procedure to be followed for re-entry of domestic items without duty. 19 CFR § 10.17(a), [now 19 CFR § 148.31]. That regulation provides that goods, wares or merchandise of domestic origin must be declared. The reason is that to hold otherwise would frustrate the purposes of the Customs or Revenue laws. As the court said in *United States v. 20 Cases of Matches*, *supra*, at 243, "The object of the law is to prevent frauds upon the revenue." See also *United States v. Cut and Polished Diamonds*, *supra*; *United States v. One Lot of Emeralds*, 461 F.2d 1180 (5th Cir. 1970), *aff'd*, 409 U.S. 232 (1972).

Since the early days of this country, courts have held that merchandise of domestic origin must be declared upon entry or re-entry into the United States. For example, in *United States v. 20 Cases of Matches*, *supra*, the proof showed that the matches were manufactured in Portland, Maine, and intended for delivery in Chicago, Illinois. The matches so intended for delivery were placed upon the Grand Trunk Railway, a Canadian corporation, at Portland. The train, enroute to Chicago, passed through Canada and stopped at Milwaukee, Wisconsin, there, the goods were unladen without a permit (without declaring them), and the goods were seized by Customs collectors. The seizure was made pursuant to the

predecessor of 19 CFR Section 10.17(a). The Court said that even though the goods (matches) be manufactured or produced in the United States, and even though no duty be owing thereon, they must still be declared at the risk of forfeiture.

Similarly, in *United States vs. Cut and Polished Diamonds*, *supra*, the Court found that the Government's seizure of diamonds because of the claimant's failure to declare them to Customs officers was proper as a matter of law. There, the claimant was carrying diamonds for ultimate delivery to Bermuda. Because of unforeseen flying conditions, the plane had to bypass Canada on the way to Bermuda and make an unscheduled landing in Boston, Massachusetts. As soon as the claimant learned he was in the United States, he made immediate plans to obtain the first available flight back to Canada. In the meantime, Customs officers approached him and asked if he had anything to declare, to which he replied in the negative. The Customs officers subsequently found the diamonds and seized them. The Court said that the statutes quoted above require the claimant to make a declaration of what he carries regardless of his intent. The Court went on to say that the Government has a legitimate concern to discover what a person has when he enters the United States.

In any event, the Magistrate found that the jewelry in question was not of domestic origin, choosing to disbelieve the testimony of Klein that the goods were manufactured in the United States and loaded into his vehicle in the United States. In light of the testimony adduced upon the trial, such findings were not clearly erroneous and, therefore, not subject to review by this Court. *United States v. Boston*, 508.2d 1171, 1179 (2d. Cir. 1974); *United States v. Brownstein*, 521 F.2d 459, 463 (2d. Cir. 1975).

The Magistrate's decision to totally discredit the testimony of Klein was based upon the fact that while Klein testified that he did not declare the items of jewelry found in his trunk because he was of the opinion that since they were of domestic origin, he had no duty to declare them, the evidence showed that he already knew that he had to declare items of domestic origin for when confronted by the three items of jewelry found in his pockets by a Customs inspector prior to the search of the automobile, he made the same statement and was promptly informed that he still had to declare items of domestic origin (App. 14).

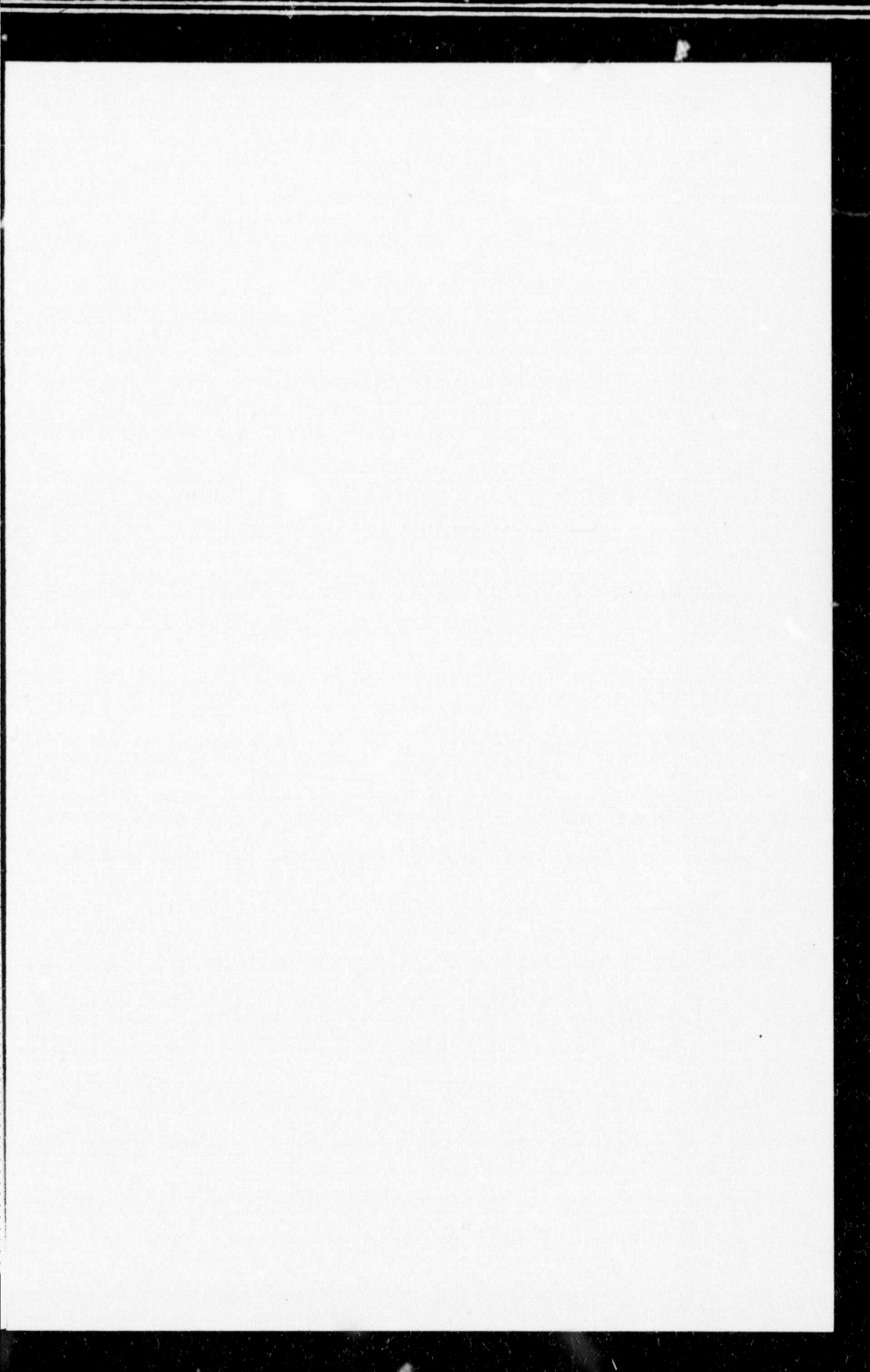
Conclusion.

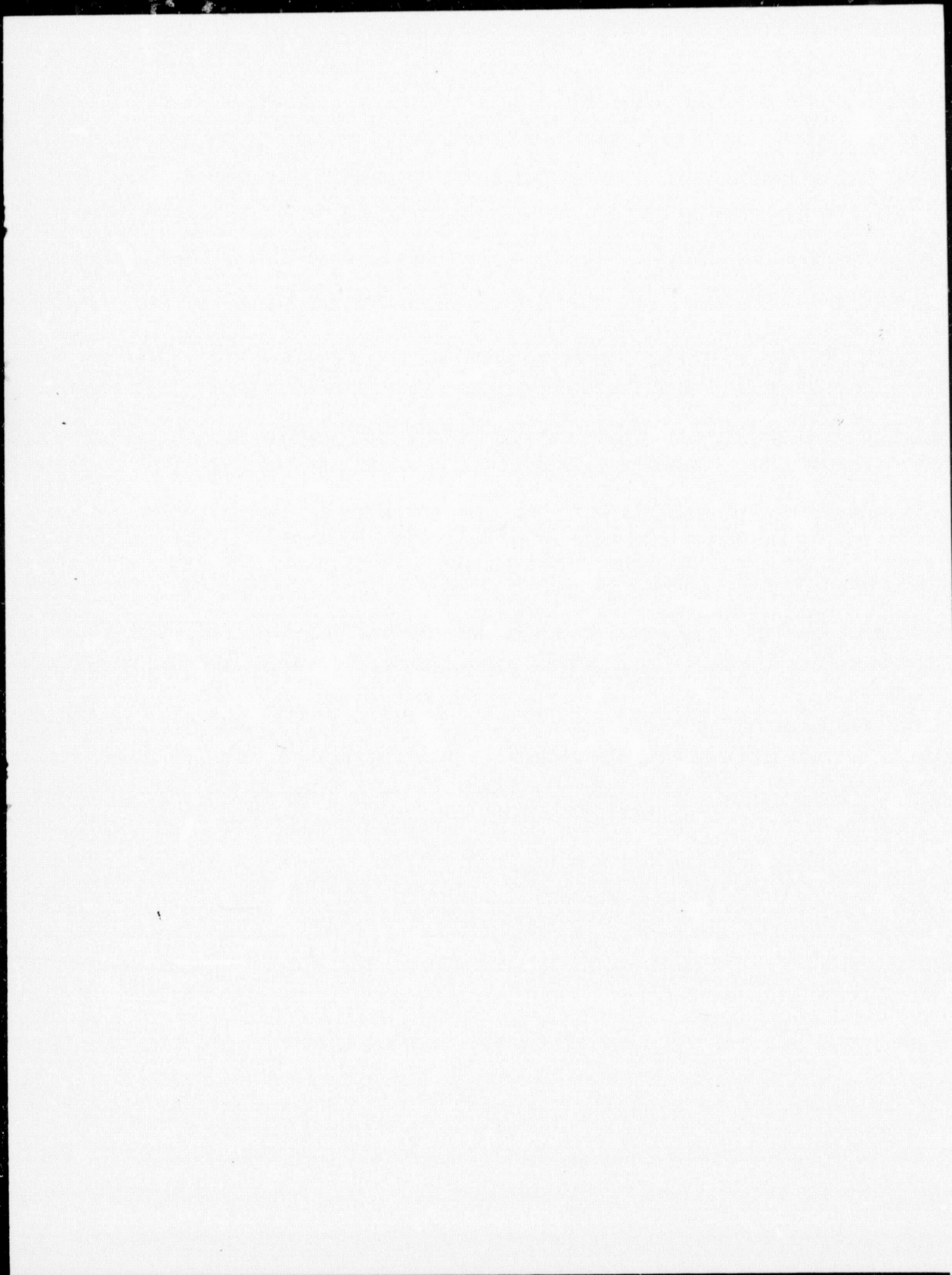
For all of the foregoing reasons, the judgment should, in all respects, be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

Re: USA vs. 190 Pieces of
Gold Jewelry etc.

77-6146

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
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New Federal Court House
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Richard J. Arcara, Esq., U. S. Attorney, 502 U. S.

Courthouse, Buffalo, NY 14202, Att: Roger P. Williams Esq.

Asst. U. S. Attorney

Leslie R. Johnson

Sworn to before me this

28th day of Nov., 19 77

Patricia A. Lacey

PATRICIA A. LACEY

NOTARY PUBLIC, State of New York, Genesee County
My Commission Expires March 29, 1978.